

DRAFT
FOR DISCUSSION ONLY

EMPLOYEE AND STUDENT ONLINE PRIVACY PROTECTION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
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~~November 5, 2015~~ February 1985, 2016

EMPLOYEE AND STUDENT ONLINE PRIVACY PROTECTION ACT

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EMPLOYEE AND STUDENT ONLINE PRIVACY PROTECTION ACT

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EMPLOYEE AND STUDENT ONLINE PRIVACY PROTECTION ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Employee and Student Online Privacy Protection Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Educational institution” means a person that provides students at the postsecondary [or secondary] level an organized course of study that is academic, ~~technical~~, trade-oriented or ~~otherwise~~ preparatory for gaining employment in a recognized occupation. The term includes a public or private educational institution but ~~does not include~~ a home school ~~as defined by state law~~. The term includes a teacher, coach, school administrator or other ~~an agent, representative, or designee~~ persons that acts, or that a student reasonably believes is acting, on behalf of ~~the~~ the educational institution.

(2) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) “Employee” means an individual who provides services or labor to an employer in exchange for compensation. The term includes a prospective employee, ~~who has expressed an interest in or applied for employment or whom an employer is otherwise considering for employment.~~

(4) “Employer” means a person that provides compensation to ~~an~~ one or more employees in exchange for services or labor. The term includes ~~an~~ a person that acts, or that an employee reasonably believes is acting, on behalf of the employer. ~~agent, representative, or designee of the employer.~~

(5) “Login information” means a user name and password, password, or other means or credentials of authentication required to access or control a protected personal online account, or

1 to access or control an electronic device that the employer or educational institution has not
2 supplied or paid for and that itself provides access to or control over a protected personal online
3 account.

4 (6) "Login requirement" means a requirement that login information be provided before a
5 ~~user can access or control~~ an online account or an electronic device can be accessed or
6 controlled.

7 [(7) "Metadata" means data that provides information about other data.]

8 (8) "Online" means accessed by means of a ~~computer, a~~ computer network, or the
9 Internet.

10 ~~(9) "Online account" means a discrete set of online information concerning or established~~
11 ~~by an individual that the individual can access and control.~~

12 ~~(914)~~ "Person" means an individual, estate, business or nonprofit entity, public
13 corporation, government or governmental subdivision, agency or instrumentality, or other legal
14 entity.

15 ~~(104)~~ "Protected personal online account" means an individual's online account that
16 ~~requires login information in order to access or control that account~~ is protected by a login
17 requirement. In a situation in which an employee or student has reasonable notice that the
18 employer or educational institution may require login information for, or access to, the online
19 account, t ~~The term does not include~~ he term does not include:

20 (A) an employee's online account that an employer supplies or pays for [, except
21 where an employer pays only for additional features or enhancements];

22 (B) an online account that an employee creates, ~~or~~ maintains, or uses primarily
23 on behalf of or under the direction of an employer in connection with that employee's

employment, for that an employee obtained by virtue of the employee's employment relationship with the employer];

(C) a student's online account that an educational institution supplies or pays for, except where an educational institution pays only for additional features or enhancements; or

(D) an online account that a student creates, ~~or maintains~~, or uses primarily -on behalf of or under the direction of an educational institution in connection with that student's education, for that a student obtains by virtue of the student's educational relationship with the educational institution].

(1~~2~~) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in a perceivable form.

(1~~2~~) "Student" means an individual who participates, ~~on a full-time or part-time basis~~, in an educational institution's organized course of study. The term includes:

(A) a prospective student ~~who has expressed an interest in attending or applied for admission to an educational institution or whom an educational institution is otherwise considering for admission~~; and

(B) a parent or legal guardian of a student ~~who is~~ under the age of [majority].

SECTION 3. APPLICABILITY.

(a) Except as otherwise provided in subsection (b), this [act] applies to an employer that ~~that requires~~, coerces or requests an employee, and an educational institution that requires, coerces or requests a student, ~~and an educational institution that coerces a student~~, to provide the login information for, disclose the content of, or alter the settings of ~~access to or control over~~ a protected personal online account, or that requires or coerces an employee or student to add the employer or educational institution to the list of contacts associated with the account ~~that is~~

protected by a login requirement.

(b) This [act] does not apply to

~~(b) —~~ (1) employer or educational institution access to ÷

~~(1) an employer or educational institution that accesses an employee's or student's personal~~ an online account or the part of an online account that is available to the general public or not protected by a login requirement;

(2) employer or educational institution actions, other than the actions described in subsection (a), that are necessary to maintain or monitor the functioning of the employer's or educational institution's information and communications technology systems;

~~[(32) the federal government;]~~

~~[(43) a federal, state, county, or local law enforcement agency that seeks to view the contents of, but not to obtain login information for, an employee's protected personal online account;]~~

~~[(54) a federal, state, county, or local department of corrections, including an authorized private entity that performs the same correctional functions as a state, county, or local department of corrections, that seeks to view the content of, but not to obtain login information for, an employee's protected personal online account;]~~ -or

~~(65) an individual who employs another individual to provide care for a minor child, elderly adult or other vulnerable licensed child care provider, licensed home health care provider, or other licensed employer that needs access to its employee's protected personal online account to protect the interests of a vulnerable person~~ third party.

SECTION 4. EMPLOYEE PROTECTIONS.

(a) Except as otherwise provided in subsections (b) ~~and~~ (c):

(1) An employer may not:

~~(A) require, coerce, or request~~ request, or otherwise coerce an employee

to:

~~(1A) disclose the login information for~~ content or metadata of, or
login information for, a protected personal online account;

~~(2B) disclose the content [or metadata] of a protected personal~~
online account;

~~(3) alter the settings of a protected personal online account,~~
including settings that affect whether another individual is able to view the content of the
account; or

~~(4) access the content of a protected personal online account in the~~
presence of the employer in a manner that enables the employer to observe the content; or;

~~(B) require or coerce an employee to~~

~~(C) add~~ add the employer to the list of contacts associated with
associated with the employee's a protected personal online account; or

~~(D) access a protected personal online account in the presence of the~~
employer in a manner that enables the employer to observe the content of the account.

(2) An employer may not take or threaten to take an adverse action against an
employee for noncompliance with a requirement, coercive demand, or request an action of the
employer that violates paragraph (1).

(3) An employer that, without violating paragraph (1), inadvertently acquires
login information for, or the login-protected content [or metadata] of, an employee's protected
personal online account:

1 (A) does not, solely by ~~inadvertently~~ acquiring that information, violate
2 this section;

3 (B) may not use the login information to access or alter an employee's
4 protected personal online account;

5 (C) may not take or threaten to take an adverse employment-related action
6 against the employee based on the content [or metadata] of the employee's protected personal
7 online account;

8 (D) may not ~~read, review, record,~~ or share the login information for, or the
9 content [or metadata] of, the employee's protected personal online account; ~~and~~

10 (E) shall, as soon as and to the extent practicable, dispose of the login
11 information for, and the content [or metadata] of, the employee's protected personal online
12 account; [and] ~~in such a way as to make it infeasible for the employer to retrieve that~~
13 ~~information.~~

14 [(F) shall, as soon as and to the extent practicable, notify the employee of
15 its acquisition of the information.]

16 ~~(4) An employee may, of the employee's own initiative, give informed, voluntary~~
17 ~~consent to having others, including the employer, access or control the employee's protected~~
18 ~~personal online account.~~

19 (b) Subsection ~~(a)s (a)(1) through (3)~~ does not apply to an employer action that is
20 necessary to:

21 (1) comply with federal or, state, ~~or local~~ law, the rules of a self-regulatory
22 organization defined in section 3(a)(26) of the Securities and Exchange Act of 1934, 15 USC
23 78c(a)(26), or the rules of another self-regulatory organization established by statute that requires

1 an employer to inspect or monitor an employee's protected personal online account;

2 (2) investigate whether the employee has violated ~~or~~ is violating or is reasonably
3 likely to ~~[or intends to violate]~~ ~~federal, state, or local~~ federal or state law; or a non-pretextual
4 ~~bona fide~~ employer policy that is in writing or otherwise in a record, and of which the employee
5 had reasonable notice, where:

6 (A) the employer reasonably suspects that the employee has violated or is
7 violating ~~[or intends to violate]~~ or is reasonably likely to violate the law or policy; and

8 (B) the employer accesses only an accounts, content, ~~[or metadata]~~ that it
9 reasonably believes to be relevant to the investigation;

10 (3) take adverse action against the employee for violating ~~federal, state, or~~
11 ~~local~~ federal or state law or a ~~bona fide~~ non-pretextual employer policy that is in writing or
12 otherwise in a record and of which the employee had reasonable notice; or

13 (4) protect against:

14 (A) a ~~significant~~ threat to health or safety; or

15 (B) a significant threat to employer information or communications
16 technology systems or other employer property; or

17 ~~(CB)~~ disclosure of information in which the employer has a proprietary
18 interest or that the employer has a legal obligation to keep confidential.

19 (c) ~~An employer may:~~

20 ~~(1) access an employee's protected personal online account if it can do so without~~
21 ~~the employee's login information and without taking an action that subsection (a) prohibits; and~~

22 ~~(2) maintain and monitor the functioning of the employer's information and~~
23 ~~communications technology systems and equipment if the employer can do so without employee~~

~~login information and without taking an action that subsection (a) prohibits.~~

~~(d)~~ Subsections (b) ~~and (c)~~ do not permit an employer to:

(1) use its access to, or the content [or metadata] of, an employee's protected personal online account obtained pursuant to subsection (b) for a purpose unrelated to a purpose not specified in subsection (b); or

(2) alter the settings or content of an employee's protected personal online account, unless:

(A) the employer has a proprietary interest in ~~these~~ settings or ~~that~~ content;

(B) ~~federal, state or local~~ federal or state law or a court order requires or authorizes the employer to alter ~~these~~ settings or ~~that~~ content; or

(C) to do so is necessary to protect against a ~~significant~~ threat to health or safety; or -

(3) require, coerce, or request an employee to provide login information unless there is no less intrusive means of accomplishing the purpose specified in subsection (b).

SECTION 5. STUDENT PROTECTIONS.

(a) Except as otherwise provided in subsections (b) ~~and~~ (c):

(1) An educational institution may not

(A) require, coerce, or request a student to:

(1) disclose the login information for a protected personal online account;

(2) disclose the content [or metadata] of a protected personal online account;

1 (3) alter the settings of a protected personal online account,
2 including settings that affect whether another individual is able to view the content of the
3 account; or

4 (4) access the content of a protected personal online account in the
5 presence of the educational institution in a manner that enables the educational institution to
6 observe the content; or

7 (B) require or coerce a student to add the educational institution to the list
8 of contacts associated with the student's protected personal online account.

9 ~~(1) An educational institution may not require, request, or otherwise coerce a~~
10 ~~student, to:~~

11 ~~(A) disclose the content or metadata of, or login information for, a~~
12 ~~protected personal online account;~~

13 ~~(B) alter the settings of a protected personal online account, including~~
14 ~~settings that affect whether another person is able to view the content of that account;~~

15 ~~(C) add the educational institution to the contacts associated with a~~
16 ~~protected personal online account; or~~

17 ~~(D) access a protected personal online account in the presence of the educational institution in a~~
18 ~~manner that enables the educational institution to observe the content of the account.~~

19 (2) An educational institution may not take or threaten to take an adverse action
20 against a student for noncompliance with a requirement, coercive demand, or request ~~an action of~~
21 ~~the educational institution~~ that violates paragraph (1).

22 (3) An educational institution that, without violating paragraph (1), inadvertently
23 acquires login information for, or the login-protected content [or metadata] of, a student's

protected personal online account:

(A) does not, solely by ~~inadvertently~~ acquiring that information, violate this section;

(B) may not use the login information to access or alter a student's protected personal online account;

(C) may not take or threaten to take an adverse education-related action against a student based on the content ~~or metadata~~ [or metadata] of the student's protected personal online account;

(D) may not ~~read, review, record,~~ or share the login information for, or the content ~~or metadata~~ [or metadata] of, the student's protected personal online account; ~~and~~

(E) shall, as soon as and to the extent practicable, dispose of the login information for, and content ~~or metadata~~ [or metadata] of, the student's protected personal online account ~~in such a way as to make it infeasible for the educational institution to retrieve that information; and~~

[(F) shall, as soon as and to the extent practicable, notify the student of its acquisition of the information.]-

~~(4) A student may, of the student's own initiative, give informed, voluntary consent to having others, including the educational institution, access or control the student's protected personal online account.~~

(b) ~~Subsections (a)(1) through (3) do~~ Subsection (a) does not apply to an educational institution's action that is necessary to:

(1) comply with ~~federal, state, or local~~ federal or state law, or with the rules of a self-regulatory organization established by statute that requires an educational institution to

inspect or monitor a student's protected personal online account;

(2) investigate whether the student has violated, ~~or is violating~~ or is reasonably likely to violate ~~[or intends to violate] federal, state, or local~~ federal or state law, or a ~~bona fide~~ non-pretextual educational institution policy that is in writing or otherwise in a record and of which the student had reasonable notice, where:

(A) the educational institution reasonably suspects that the student has violated, ~~or is violating~~ ~~[or intends to violate]~~ or is reasonably likely to violate the law or policy; and

(B) the educational institution accesses only an accounts, content, ~~or metadata~~ [or metadata] that it reasonably believes to be relevant to the investigation;

(3) take adverse action against the student for violating ~~federal, state, or local~~ federal or state law or a ~~bona fide~~ non-pretextual educational institution policy that is in writing or otherwise in a record and of which the student had reasonable notice; or

(4) protect against:

(A) a ~~significant~~ threat to health or safety ~~or~~

(B) a significant threat to educational institution information or communications technology systems or other educational institution property; or

(C) disclosure of information in which the educational institution has a proprietary interest or that the educational institution has a legal obligation to keep confidential.

(c) ~~An educational institution may:~~

~~(1) access a student's protected personal online account if it can do so without the student's login information and without taking an action that subsection (a) prohibits; and~~

~~(2) maintain and monitor the functioning of its information and communications~~

1 ~~technology systems and equipment if it can do so without student login information and without~~
2 ~~taking an action that subsection (a) prohibits.~~

3 ~~(d)~~ Subsections (b) ~~and (c)~~ does not permit an educational institution to:

4 (1) use its access to, or the content ~~or metadata~~ [or metadata] of, a student's
5 protected personal online account obtained pursuant to subsection (b) for a purpose ~~not unrelated~~
6 to a purpose specified in subsection (b); or

7 (2) alter the settings or content of a student's protected personal online account,
8 unless:

9 (A) the educational institution has a proprietary interest in the ~~ese~~ settings
10 or that content;

11 (B) ~~federal, state or local~~ federal or state law or a court order requires or
12 authorizes the educational institution to alter those settings or that content; or

13 (C) to do so is necessary to protect against a ~~significant~~ threat to health or
14 safety; ~~or~~

15 (3) require, coerce, or request a student to provide login information unless there
16 is no less intrusive means of accomplishing the purpose specified in subsection (b).

17 SECTION 6. CIVIL ACTION.

18 (a) ~~The state~~ [Attorney General] may bring a civil action against an employer or
19 educational institution alleging a violation of this [act]. ~~A prevailing state~~ [Attorney General]
20 may obtain:

21 (1) injunctive and other equitable relief; and

22 (2) a civil penalty of \$~~[1000]~~ for each violation.

23 (b) An ~~affected~~ employee or student may bring a civil action against an employer or

educational institution for a violation of this [act]. An action under subsection (a) does not preclude an action under this subsection.

(c) In an action under subsection (b):

(1) ~~an prevailing~~ employee or student may obtain:

(A) injunctive and other equitable relief;

~~{(B) [for each violation, damages in the amount of \$[1000] or] actual damages[, whichever is greater]; {and}}~~

~~{(C) punitive damages; and~~

~~(CD) -}~~ costs and reasonable attorneys' fees; and

(2) the court may award a prevailing employer or educational institution costs and reasonable attorneys' fees if the court determines the action was frivolous.

SECTION 7. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

[SECTION 8. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

***Legislative Note:** Include this section only if this state lacks a general severability statute or a decision by the highest court of this state stating a general rule of severability.*

~~**SECTION 9. SAVING CLAUSE.** This statute does not affect the validity or effect of~~

1 ~~an existing state, [county], or local law that protects a protected personal online account to a~~
2 ~~greater degree than this [act] does.~~

3 **SECTION 10. REPEALS; CONFORMING AMENDMENTS.**

4 (a)

5 (b)

6 (c)

7 **SECTION 11. EFFECTIVE DATE.** This [act] takes effect